APPENDIX A -- ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED JULY 26, 2000.

United States Court of Appeals for the Tenth Circuit
Decided July 26, 2000.

No. 00-4022

Roger Liverman, Jr.,
Plaintiff- Appellant

v

Henry J. Hyde and the
Committee on the Judiciary
of the U.S. House of Representatives
Defendants-Appellees

Order and Judgment[1]

Before **Baldock**, **Henry**, and **Lucero**, Circuit Judges

The plaintiff Roger Liverman, Jr. appeals the district court's order dismissing his petition for a writ of mandamus. In his petition, Mr. Liverman alleged that the defendants the Committee on the Judiciary of the United States House of Representatives and Henry J. Hyde, the Chairman of that Committee, violated his First Amendment right to petition the government for redress of grievances and his Fourteenth Amendment due process rights. According to Mr. Liverman, the defendants failed to schedule a hearing on the petition that he filed with the United States house of

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* This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments, nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Representatives on September 22, 1997. He requested the district court to order the defendants to set a hearing.[2]

Following the recommendation of the magistrate judge, the district court dismissed Mr. Liverman's petition for failure to state a claim upon which relief could be granted. Upon review of Mr. Liverman's mandamus petition and the parties' briefs, we agree with the reasoning of the magistrate judge and the district court. "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy . . . Absent statutory restrictions, the State must be free to consult or not consult whomever it pleases." Minnesota State Bd. for Community Colleges v Knight, 465 U.S. 271, 283-85 (1984). Although some of the authorities upon which Mr. Liverman relies suggest that some government agencies may be required to provide hearings in certain situations, those authorities involve citizens who had property or liberty interests at stake. See Aplt's Br. At 11-13 (citing, inter alia, Mathews v Eldridge, 424 U.S. 319 (1976) and Goldberg v Kelly, 397 U.S. 254 (1970)). That is not the case here.

Accordingly, the district court's order dismissing Mr. Liverman's petition for a writ of mandamus is AFFIRMED.[3]

Entered for the Court, Robert H. Henry
United States Circuit Judge

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[2]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal, See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

[3]In light of the issuance of this order and judgment, appellant's motion for immediate ruling is moot.

APPENDIX B –ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION DECIDED JANUARY 28, 2000.

In The United States District Court for the District of Utah, Central Division Decided January 28, 2000.
Case No. 2:99-CV-656C

Roger Liverman, Jr.,
Plaintiff

v

Henry J. Hyde and the
Committee on the Judiciary
of the U.S. House of Representatives
Defendants

Order

Plaintiff filed this action pursuant to 28 U.S.C.§ 1361, alleging that defendants violated plaintiff's First Amendment right to governmental redress of grievances and his Fourteenth Amendment Due Process right to be heard. The case was referred to United States Magistrate Judge Alba pursuant to 28 U.S.C.§ 636(b)(1)(B).

Defendants filed a motion to dismiss, and the matter was fully briefed. On January 12, 2000, Judge Alba issued a Report and Recommendation, recommending that defendants' motion to dismiss be granted. On January 20, 2000, plaintiff filed an objection to Judge Alba's Report and Recommendation.

The court has reviewed the file, Judge Alba's Report and Recommendation, and plaintiffs objections. The court agrees with Judge Alba's conclusion that plaintiff does not have a constitutional or statutory right to have his grievance heard by Congress. Further, the

evidence establishes that the materials and petition plaintiff submitted were referred to the House Committee on the Judiciary and that the Committee is evaluating plaintiff's claim.

Accordingly, the court hereby adopts the United States Magistrate Judge's Report and Recommendation as the order of the court. Defendant's motion to dismiss is GRANTED and all claims against defendants are DISMISSED without prejudice.

SO ORDERED this 27 day of January, 2000

BY THE COURT
"s/ Tena Campbell"
Tena Campbell
United States District Judge

APPENDIX C -- REPORT AND RECOMMENDATION, U.S. MAGISTRATE JUDGE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION ISSUED JAN. 12, 2000.

In The United States District Court for the District of Utah, Central Division Decided January 28, 2000.
Case No. 2:99-CV-656C

Roger Liverman, Jr.,
Plaintiff

v

Henry J. Hyde and the
Committee on the Judiciary
of the U.S. House of Representatives
Defendants

Report and Recommendation

The plaintiff, Roger Liverman, Jr., ("Liverman"), a pro se plaintiff, filed this action pursuant to 28 U.S. C. §1361, alleging that Defendants Henry J. Hyde ("Hyde"), Chairman of the Committee on the Judiciary, and the Committee on the Judiciary of the United States House of Representatives ("Judiciary Committee") violated Plaintiff's First Amendment right to governmental redress of grievances and his Fourteenth Amendment Due Process right to be heard.

Procedural History

In September 1997, Plaintiff Liverman filed a pro se petition with the United States House of Representatives, which was referred to the Judiciary Committee. It is undisputed that the Committee has not responded to Liverman's petition. In seeking a

response from the Judiciary Committee, Liverman filed a Writ of Mandamus with this court in November 1998 (Case No. 2:98-CV-823G) ("1998 Writ"). Liverman claimed that the Committee's inaction violated his First Amendment rights and asked the court to "set a time and date" for a hearing to address his petition. In December 1998, Defendants Hyde and the Judiciary Committee both moved to dismiss the 1998 Writ. Subsequently, Liverman voluntarily moved to dismiss the 1998 Writ. The court granted Liverman's motion and dismissed the 1998 Writ without prejudice.

Then, on August 23, 1999, Liverman refiled this action pursuant to 28 U.S.C. § 1361 and Federal Rule of Civil Procedure 81(b). The case was assigned to United States District Court Judge Tena Campbell, who referred the matter to United States Magistrate Judge Samuel Alba pursuant to 28 U.S.C. § 636(b)(1) (B)[1].

In filing this Writ of Mandamus, Liverman has asserted that Defendants Hyde and the Judiciary Committee ("Defendants") have violated Plaintiffs First Amendment right to governmental redress of grievances and his Fourteenth Amendment Due Process right to be heard. Liverman also prays for the court to require Defendants to set a time and date for Liverman to petition the Judiciary Committee for Redress of Grievances and a Petition for Private Claim[2]

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[1] Initially, this case was referred to Magistrate Judge Alba according to 28 U.S.C. § 636 (c) for this court to order the entry of judgment. However, 28 U.S.C. § 636(c) requires that all parties consent to the jurisdiction of the magistrate judge and in this case only Plaintiff Liverman has consented to the jurisdiction of the magistrate judge. Therefore, Judge Campbell changed the order of reference to Judge Alba according to 28 U.S.C. § 636 (b)(1) (B).

[2] Liverman also requested oral argument on his motions before this court. However, the court has determined that oral argument would not add anything to the case and declines to hold

Having reviewed the pleadings and supporting memoranda filed by the parties, the court hereby issues the following Report and Recommendation regarding Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(6).

Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint where plaintiff fails to "state a claim upon which relief can be granted." Fed. R. P. 12(b)(6). "The complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Hall v. Bellmon, 935 F.2.d 1106, 1009 (10th Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Furthermore, "[d]ismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 806 (10th Cir. 1999). "In determining whether dismissal is proper, we must accept the allegations of the complaint as true and we must construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff." Id. See also Hall, 935 F.2d 1109. In other words, "[d]ismissal for failure to state a claim is proper only when it is clear beyond doubt that the complaint, viewed most favorably to the

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a hearing pursuant to DUCivR 7-1(f), which provides that "requests for oral arguments on motions will be granted on good cause shown . . . otherwise, motions are to be submitted to and will be determined by the court on the basis of the written memoranda of the parties."

plaintiff, cannot be read to state a valid claim." Shaffer v. Saffle, 148 F. 3d 1180, 1181 (10th Cir. 1998) (citing Hall, 935 F.2d at 1109-10).

Where a complaint has been filed by a pro se litigant, the litigants's "pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Id. (quoting Hall, 935 F. 2d at 1110). The Tenth Circuit has interpreted this rule to mean that if "the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements," Hall, 935 F.2d at 1110.

However, the Tenth Circuit has stated that " '[t]he broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. ... Nevertheless, conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based ..." Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996) (citing Hall, 935 F.2d at 1110). In other words, when "analyzing the sufficiency of the plaintiff's complaint, the court need to accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations." Hall, 935 F.2d at 1110 (citing Dunn v White, 880 F.2d 1188, 1197 (10th Cir. 1989)).

Legal Analysis

This Court recommends that all of plaintiff's claims against the Defendants be dismissed without prejudice pursuant to Federal Rule of Civil Procedure 12 (b)(6). Plaintiff has simply failed to state a claim upon which relief can be granted. In his pleadings, plaintiff has alleged that defendants violated the First Amendment

and the Due Process Clause of the Fourteenth Amendment in failing to hear and redress his grievances. The Supreme Court has held that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." Minnesota State Board for Community Colleges v Knight, 465 U.S. 271, 283 (1984). The Court added, "Absent statutory restrictions, the state must be free to consult or not consult whomever it pleases."[3] Id. at 285. The Judiciary Committee is clearly a public body which makes decisions regarding policy. Plaintiff simply does not have a Constitutional right to be heard by the Judiciary Committee.

However, the Supreme Court in Knight stated, "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require governmental policymakers to listen or respond to individuals' communications on public issues." Id. at 285.

Other courts have ruled similarly. In Bi-Metallic Investment Co. v State Bd. of Equalization, the United States Supreme Court explained that the issue in the case was "whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned . . ." 239 U.S. 441,445

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[3]Plaintiff contends that 2 U.S.C. § 1901 places a duty on Congress to hear his grievance. However, plaintiff has merely misunderstood the statute. Section 1901 is entitled "Private claims pending before Congress; taking of testimony" and states that "any committee of either House of Congress before which any private claim against the United States may at any time be pending, . . . may order testimony to be taken, . . ." 2 U.S.C. §1901. Clearly the statute does not give a right to have a grievance redressed before a House of Congress. Rather, the statute only allows a committee of a House of Congress to choose to have testimony taken by a mastery in chancery in private actions which are already pending before Congress. No right to be heard is inherent in the statute.

(1915). Then the Court held that there was no Constitutional right to be heard, stating, "The Constitution does not require all public acts to be done in town meeting or assembly of the whole. General statutes within the state power are passed that affect the person or property individuals, sometimes to the point of ruin, without giving them a chance to be heard." Id.

In addition, in Craft v McNulty, the plaintiff sued a United States Representative for failing to follow up on alleged wrong-doings of the Internal Revenue Service. 875 F. Supp. 121,122 (N.D.N.Y. 1995). The court in that case stated that the defendant Representative's action was "neither inappropriate nor actionable." Id. at 123 Similarly, in Richards v Harper, plaintiff sued a United States Representative for failing to assist him. 864 F.2d 85, 86 (9th Cir. 1988). The court ruled that the representative's "failure to assist [plaintiff] was neither inappropriate nor actionable." Id. at 88. See also Popovic v. United States, 997 F. Supp. 672, 679 (D. Maryland 1998)(determining that plaintiff "had no [due process] right not to have his case investigated by the Congressional Subcommittee . . . "); McDonough v Ney, 599 F. Supp. 679, 683 (D. Maine 1984)(finding that "Plaintiffs have alleged no act or omission or commission by these Federal defendants, except their failure to intervene, which was neither inappropriate nor actionable.")

The cases cited by plaintiff are inapposite. Although they do show that in some instances a party may have a right to notice and a hearing, those cases involve an established property right or liberty interest that is being rescinded. See e.g., Mathews v Eldridge, 424 U.S. 319, 333 (1976) (stating that "This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest). In this case, plaintiff has not articulated any facts which establish that he is at risk of being

deprived of a viable property or liberty interest. As such, there are no facts before the court that would entitle him to notice and hearing. Furthermore, the cases relied on by plaintiff simply do not hold that an individual has a Constitutional right to a hearing before a committee of Congress for purposes of addressing a private claim.

Because plaintiff does not have a Constitutional right to be heard by a member or committee of Congress, the court finds that plaintiff has simply failed to assert a claim that is actionable.

Accordingly,

IT IS HEREBY RECOMMENDED that Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure be **GRANTED**, and that the case be **dismissed without prejudice**.

Copies of the foregoing Report and Recommendation are being mailed to the parties who are hereby notified of their right to object to the same. The parties are further notified that they must file any objections to the Report and Recommendation, with the clerk of the district court, pursuant to 28 U.S.C. § 636(b), within ten (10) days after receiving it. Failure to file objections may constitute a waiver of those objections on subsequent appellate review.

Dated this 15th day of January, 2000.

By the Court:
"s/ Samuel Alba"
Samuel Alba
United States Magistrate Judge